

CGF POINT OF LAW

E-NEWSLETTER OF CLARKE GITTENS FARMER, ATTORNEYS-AT-LAW

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ABOUT



Clarke Gittens Farmer is one of the principal law firms in Barbados. The firm is a commercial law firm, providing legal services for both domestic and international corporate and private clients. The firm strives to provide high quality work in banking, corporate, commercial, business law and commercial litigation. The firm also advises clients on the purchase and sale of residential and commercial property in Barbados and maintains a significant trademark and patent registration practice.

INTRODUCTION

In this issue, we explore a variety of legal situations ranging from the personal to the international.

Boundary disputes are a frequent strain on good, neighbourly relations. However, intruding hedges and encroaching outbuildings can be much more than an annoyance. As explained in this issue's first article, a long-standing encroachment can permanently change the boundary between you and your neighbour, thereby reducing the area of your property. Please read on to learn more about the legal effect of encroachments, and what you can do to remedy them before it is too late.

In our second article, we look at the law related to guarantees, considering an important but relatively unexplored question: can the benefit of a guarantee be assigned?

Our third article explores the Canada-Barbados bilateral investment treaty. It discusses who is an "investor" within the meaning of the treaty, and what rights of enforcement an investor may have against the host jurisdiction.

We hope you enjoy this issue's offerings.

The e-Newsletter Committee

❖ Common Problems with Encroachments onto Privately Owned Lands ❖

By Miss Nicole S. McKetney, Associate



Miss Nicole S. McKetney

Introduction

This article discusses the effects of encroachments onto property and the recommended steps to be taken by a landowner who finds an encroachment on his property. The steps an encroaching neighbour can take to retain his encroachment will be dealt with in a later article.

What is an Encroachment?

An encroachment is an interference with or intrusion onto another's land. Examples of encroachments are buildings or walls erected on another person's land. Encroachments may also include overhanging branches from a neighbour's tree.

Effects of Encroachments

1. **Change in Boundaries**

If a landowner fails to assert his title in relation to the area being encroached upon the effect may be a change in his property's boundaries through adverse possession or estoppel.

Adverse possession occurs where the neighbour can prove his intention to possess and his physical possession of the area of land for a period (generally ten years in the case of private land) prescribed by the Limitation of Actions Act, Cap. 231 ('**the limitation period**'). The landowner's title to that area is then extinguished and the neighbour can apply to have title formally vested in him under the Land (Title Proceedings) Act, 2011-7 (in the case of unregistered land) or the Land Registration Act, Cap. 229 (in the case of registered land). The landowner will be notified of the neighbour's application under those Acts by service of a notice on the landowner and publication of notices in newspapers.

A change of boundaries through estoppel is rarer. This can happen if someone enters onto land under a belief or expectation (encouraged and consented to by the current or previous owner) that he has an interest in that area of land and he acts to his detriment based

on this belief e.g. by erecting his building on that land. The landowner is then barred from lawfully objecting to the encroachment.

2. **Delay and Expense on a Sale or Mortgage**

An encroachment may affect the vendor's ability to give a good and marketable title. Depending on the size of the encroachment, a purchaser may argue that if the encroachment is allowed to remain, he will be getting a materially different parcel of land than what he bargained for. As a result, a vendor may have to remove the encroachment, which could delay the sale and constitute an additional unexpected expense. If the encroachment cannot be removed, the vendor may have to reduce the sale price or the sale may have to be cancelled.

Similar problems can arise if a lender discovers an encroachment when a landowner is trying to mortgage his property. The disbursement of the loan may be delayed while the encroachment is dealt with to the lender's satisfaction.

Recommended Steps for Landowners

1. **Discovery**

A survey by a licensed land surveyor can reveal new or potential encroachments. Consider having the surveyor conduct a new survey if (a) a substantial period of time has passed since the lot plan was prepared, (b) you simply want to ascertain the location of your boundaries; or (c) you or your neighbours plan to erect any permanent structures close to your shared boundaries. In the last circumstance, the land surveyor should physically point out the line marks before anyone commences construction.

A new survey should also be done before contracting to sell the property. This will give you adequate time to have an encroachment removed. Alternatively, you can disclose the encroachment in the agreement for sale so that, at the outset, the purchaser agrees to purchase the property with the encroachment.

❁ Common Problems with Encroachments onto Privately Owned Lands Cont'd. ❁

By Miss Nicole S. McKetney, Associate

2. Discussion

If there is an encroachment onto your land, try having a civil discussion with your neighbour to request its removal.

If you have no objection to the encroachment, it is advisable that you still talk to your attorney before agreeing any course of action with the neighbour. Your attorney can prepare a document designed to allow the neighbour to lawfully use your land while preserving your title. The type of document can range from an informal letter granting your neighbour permission to use the area to a more formal document depending on what the situation warrants.

An example of a more formal document is a deed of acknowledgment of encroachment by which your neighbour acknowledges your title to the area being encroached upon. This re-starts the limitation period from the date of acknowledgment.

By the deed, the neighbour should also promise to remove the encroachment at his own expense on your request. Nevertheless, please bear in mind that if the neighbour fails to honour the deed's terms, you will likely have to go to court to enforce the deed.

Other types of formal documents that your attorney can prepare include a lease and an easement.

3. Self-help

Removing the encroachment yourself is only justifiable in clear and simple cases (such as in the case of overhanging tree branches or encroaching tree roots where no physical damage will be caused to the neighbour's land) or in an emergency. In taking matters into your own hands, you run the risk of committing a trespass or starting a dispute, which could escalate to the commission of a crime.

If you choose to cut overhanging branches, you should offer the severed branches and fruit back to your neighbour, otherwise you will be liable in conversion and must compensate him for the fruit's value.

4. Court Action

If all else fails or urgent action is required to avoid imminent loss or injury, consult your attorney about the possibility of obtaining damages, a declaration as to the position of the boundary in dispute, an injunction restraining the neighbour's encroachment or an order requiring the encroachment's removal. If your neighbour is in the process of constructing a structure that you suspect is encroaching, you will need to move quickly to get an interim injunction. It will be more difficult to get one if you wait until after the structure has been completed. ❁



Assignment of Guarantees: The Key Considerations

By Miss Olivia N. D. Cadogan, Associate



Miss Olivia N. D. Cadogan

The law relating to the assignment of guarantees may be said to be ripe for discussion. Although the provision of guarantees by third parties is quite common, the assignment of those guarantees is not as frequent. Indeed, the case law relating to the assignment of guarantees is limited. Given the complexity of modern commercial transactions it is likely that the instances where parties seek to assign guarantees may increase in the future. This article therefore, seeks to identify the key considerations with respect to the assignment of guarantees.

There are no specific statutory provisions in Barbados which provide for the assignment of guarantees. It is important to note that the common law position applies to the assignment of guarantees in Barbados in the absence of any relevant statutory provisions.

A useful case on the assignment of a guarantee is *Wheatley v Bastow*¹. In that case, Turner LJ held that the person to whom a guarantee is given may assign to a third party the guaranteed debt as well as the securities for the debt. Where such an assignment takes place, the assignee has the benefit of all the rights of the assignor e.g. the right to sue on the guarantee in his capacity as assignee. A creditor is entitled to assign a guaranteed debt to someone else if there are no restrictions on his ability to do so in the relevant documents. This is largely because the principles which apply to the assignment of guarantees are the same as for the assignment of any other contract.

It is expected that the creditor will give notice to the guarantor of the assignment. Section 214 (1) of the Property Law Act, Cap. 236 states that:

'any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to

to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice

- (a) the legal right to such debt or thing in action;
- (b) all legal and other remedies for the same; and
- (c) the power to give a good discharge for the same without the concurrence of the assignor.'

Therefore, it is prudent for the assignee to ensure that the assignor gives notice to the guarantor that it has assigned the guarantee in its favour to the assignee. This notice will effectively pass the legal rights to the debt from the assignor to the assignee.

The case of *Hutchens v Deauville Investments*² highlights a limitation on the enforceability of an assigned guarantee. It was held in that case that where a party receives the benefit of a guarantee via assignment, but the principal debt itself has not been assigned to that party, the assignee cannot enforce the guarantee as two persons cannot be entitled to enforce the same debt. That is, the debt owed by the debtor in the transaction will be the same debt owed by the guarantor on any default by the debtor. Therefore, the law seeks to prevent a situation where both the creditor/assignor and the assignee are seeking to enforce the same debt.

Consequently, if the assignee intends to be capable of enforcing the guarantee on any default of the debtor, he should insist that the principal debt is also assigned.

In conclusion, guarantees may be assigned to third parties. However, to properly pass the legal title, the assignor should give notice of the assignment to the guarantor. Also, to enforce the debt on any default by the debtor, the assignee should ensure that the creditor has also assigned the benefit of the principal debt to him. 🌀

¹ (1855) 7 De G.M. & G 261; 44 E.R. 102.

² (1986) 66 ALR 367



Mrs. Nicola A. Berry

✿ Are you an "Investor" in Barbados under the Canada Bilateral Investment Treaty? ✿

By Mrs. Nicola A. Berry, Partner

On May 29, 1996, the Governments of Barbados and Canada signed an Agreement for the Reciprocal Promotion and Protection of Investments (the "**Agreement**")¹ and on January 17, 1997, the Agreement entered into force.

Article 2 of the Agreement provides, amongst other things, that each contracting party shall (i) encourage the creation of *favourable conditions* for investors of the other contracting party to make investments in its territory; (ii) accord *fair and equitable treatment* and *full protection and security* to investments or returns of investors of the other contracting party and; (iii) permit the establishment of a new business enterprise or acquisition of an existing enterprise or a share of such enterprise by investors or prospective investors of the other contracting party on a basis *no less favourable* than that which, in like circumstances, it permits such acquisition or establishment by its own investors, prospective investors, investors or prospective investors of any third state.

A Canadian investor under the Agreement is therefore entitled to have its investment accorded fair and equitable treatment, full protection and security of the law and treatment that is no less favourable than that which is accorded to local Barbadian investors.

The question of who is an "investor" under the Agreement determines whether a Canadian investor is entitled to the benefits under the Agreement. Is a Canadian holding company of a Barbados subsidiary, for example, an investor under the Agreement?

Article 1(f) of the Agreement defines "investment" broadly as "*any kind of asset owned or controlled either directly, or indirectly through an investor of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws...*". It lists particular examples of assets which are included such as movable and immovable property and any related property rights (such as mortgages), shares and intellectual property rights.

Article 1(g) of the Agreement defines "investor" (in the case of Canada) as a Canadian citizen or permanent resident or an entity incorporated in Canada who makes the investment in Barbados and who is not a Barbados citizen.

An investment indirectly owned or controlled by a Canadian holding company in a Barbados subsidiary therefore appears to come within the above definitions.

The related issue as to whether a holding company may recover for losses to its subsidiary under a BIT similar to the Agreement is well examined in investment treaty jurisprudence (which serves as a useful guide for tribunals and parties to investment arbitration proceedings). The authors of **International Investment Arbitration – Substantive Principles**² have noted that if a state commits a breach, the wrong will be done to the local subsidiary or investment vehicle and without a specific agreement to the contrary, the subsidiary will not be able to bring a treaty claim since any dispute it may have with the state will be a domestic dispute. They further note that the shareholder investor however, may be able to qualify as a claimant under an investment treaty but it will need to show that it has standing to recover damages for a wrong committed to the subsidiary.

In one of the numerous investment treaty cases on this issue, the case of *American Manufacturing and Trading Inc. v. The Republic of Zaire*³, the Tribunal considered the definition of investment provided by the USA-Zaire BIT which provided, that the term "investment" included "every kind of investment, owned or controlled directly or indirectly, including equity" as well as "a company or shares of stocks or other interests in a company or interests in the assets thereof".

¹ This form of Agreement is generally referred to as a Bilateral Investment Treaty ("**BIT**").

² Campbell McLachlan QC, Laurence Shore and Matthew Weiniger, (Oxford: Oxford University Press, 2007) at p. 184.

³ 5 ICSID Rep 11 (ICSID, 1997, Sucharitkul P. Golsong & Mbaye) at page 20.

✿ Are you an "Investor" in Barbados under the Canada Bilateral Investment Treaty? Cont'd ✿

By Mrs. Nicola A. Berry, Partner

When Zaire contested the claimant's right to recover for losses suffered by a local subsidiary, the Tribunal concluded that 94% of the subsidiary belonged to the claimant and that the claimant was formed in the US and controlled by Americans hence the subsidiary "should be considered in terms of the perfectly clear provisions of the Treaty as an investment of the Claimant".

From a review of the Agreement and investment arbitration jurisprudence on whether a shareholder/beneficial owner may make a claim under a BIT based on losses suffered by a subsidiary which is indirectly owned by it, it appears that a Canadian holding company, as the ultimate beneficial owner of a Barbados subsidiary, may have the standing to bring such a claim under the Agreement.

The particular factual circumstances and merits of each such case, however, would have to be examined and determined on a case by case basis. ✿



✿ ATTORNEY PROFILE ✿

In this issue we present our inaugural instalment of a series of profiles of the firm's attorneys.



Mr. T. David Gittens, Q.C.

We begin with a closer look at our Managing Partner, Mr. T. David Gittens, Q.C.

David's practice is a cornerstone of the firm and centres on property development. It encompasses conveyancing, financing, securitisation and construction law and the residential, resort and commercial sectors.

David's legal training commenced when he was articled with the firm of Carrington & Sealy. He studied in England for both Parts I and II of the British Law Society Solicitor Examinations and was admitted to practice in Barbados in 1978.

Just a year after his admission to practice, David started the firm Bayley & Gittens in 1979 which merged with Peter Evelyn & Co. in 1986 to form the firm of Evelyn Gittens & Farmer. David and Mr. Stephen Farmer, Q.C. also of Evelyn Gittens & Farmer later merged their practice with that of Clarke & Co. in 2002.

David has been Managing Partner since the merger. His engaging, disarming personality and approachable demeanour have been invaluable to the firm's culture.

David was appointed a Justice of the Peace in 1997 and admitted to the Inner Bar in 2007.

Outside of the firm, he maintains a keen interest in sports and is an avid tennis player.

CGF NEWS

Conferences, Courses and Seminars

On January 29, 2014 members of the firm attended a Luncheon Seminar hosted by the Barbados International Business Association ("**BIBA**") entitled, "Legislative and Judicial Initiatives, Enhancing the Image of Barbados, Facilitating New Business Development". The key presenter was the Attorney General of Barbados, the Hon. Adriel D. Brathwaite, Q.C., MP, who explored initiatives for the enhancement of Barbados' image as a centre for international investment.

On February 25, 2014 members of the firm attended another Luncheon Seminar hosted by BIBA entitled, "The Implications of the 2014 Canadian Federal Budget for Barbados as an International Business and Financial Services Centre". The presentations centred on tax implications of Canadian legislative changes for the year 2015 on Canadian investors.

On March 3, 2014 members of the firm attended a seminar hosted by the Central Bank of Barbados, in collaboration with Invest Barbados, featuring presentations by local regulators and international financial experts on how foreign financial institutions, along with individual and corporate US taxpayers will be affected by the Foreign Account Tax Compliance Act ("**FATCA**").

On March 21, 2014 members of the firm attended a Breakfast Meeting hosted by Royal Fidelity, entitled "Challenges Facing the Pension Industry". Presenters included the Director of the Financial Services Commission.

Miss Annette Linton, Mr. Creig Kinch and Miss Melanie Garrett-Bailey, all Associates of the Property Department, recently taught two modules for the Barbados Community College's Real Estate Sales course. Annette presented the module entitled "The Sale Process: A Legal Perspective" on March 13, 2014 and Creig and Melanie presented the module on Leases on March 18, 2014.

Mooting Competition

The Clarke Gittens Farmer Mooting Competition was held at the University of the West Indies with the continued support and patronage of the firm. The competition was open to first year law students of the university, providing an opportunity for them to test and hone their advocacy skills. Our Mr. Michael Koeiman, Associate in the Litigation Department, was one of the judges of the final which took place on March 12, 2014.

Publications

Ms. Debbie Fraser, Partner and Head of the Commercial Department, was interviewed for an article on Commercial Law in the March 2014 edition of *Lawyer Monthly Magazine*, about the Barbados Commercial Law sector, its legal and regulatory framework, challenges and advantages.

Mrs. Rosalind Smith Millar, Partner in the Property Department, recently contributed to the Barbados Business Brief, a synopsis of the intellectual property regime in Barbados, for the World Intellectual Property Review Annual 2014. It will be published for distribution at the INTA Annual Meeting in Hong Kong SAR in May 2014.

CGF POINT OF LAW published by Clarke Gittens Farmer is an e-Newsletter for clients, colleagues and friends of the firm. This e-Newsletter provides an overview of notable news and legal developments.

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